BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Vince Panesko, Eugene Butler, and Futurewise, Petitioners, v. Lewis County, Respondent, And The City of Napavine, Virgil Fox, the City of Toledo, and Cowlitz Indian Tribal Housing, Intervenors.	Case No. 08-2-0007c **ORDER ON MOTIONS FOR RECONSIDERATION**

THIS Matter comes before the Western Washington Growth Management Hearings Board upon several Motions for Reconsideration filed by Petitioner Panesko, Respondent Lewis County, Intervenor City of Napavine, and Intervenor Cowlitz Indian Tribal Housing in regards to the Board's August 15, 2008 Final Decision and Order in the above-captioned matter.

I. PROCEDURAL HISTORY

On August 15, 2008, the Western Washington Growth Management Hearings Board (Board) issued its Final Decision and Order (FDO). With this FDO, the Board found that Lewis County failed to comply with the Growth Management Act, RCW 36.70A, in several ways when it adopted Resolution 07-359, amending the County's Comprehensive Plan, and Ordinance 1198, amending the County's Development Regulations.

Pursuant to WAC 242-02-832, several parties to this matter filed Motions for Reconsideration of the FDO. The Board received motions from Petitioner Vince Panesko

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

(Panesko),[1] Intervenor City of Napavine (Napavine),[2] Intervenor Cowlitz Indian Tribal Housing (CITH),[3] and Respondent Lewis County (County).[4]

With his Motion, Panesko alleges the Board erred by (1) failing to order Lewis County to bring the non-compliant portions of its development regulations into compliance with the GMA; (2) failing to find the County's Comprehensive Plan, including Table 4.1, non-compliant with the GMA; and, (3) finding Petitioner's appeal untimely in regards to the map amendment for the Mossyrock UGA.[5]

With its Motion, Napavine asserts the Board erred in regard to Findings of Fact 18 and 19, both relating to the City's Urban Growth Area (UGA) and supporting needs analysis, and Conclusion of Law H, relating to the need for Lewis County to "show its work" when expanding UGA boundaries.[6]

With its Motion, CITH contends the Board erred in regards to Findings of Fact 20, 21, 22, and 23 and Conclusions of Law I and J, all relating to the expansion of the City of Toledo's UGA and the impact of the Board's 2008 Determination of Invalidity on these lands.[7]

With its Motion, Lewis County joins with CITH and argues the Board erred when it held that invalidity attaches to the land rather than to the disputed, non-compliant County plan or regulation and the Board's holding essentially creates an additional step in the re-

---

[11] Petitioner Vince Panesko filed a Motion for Reconsideration (Panesko Motion) with the Board on August 25, 2008.
[2] Intervenor City of Napavine filed a Motion for Reconsideration (Napavine Motion) with the Board on August 25, 2008.
[3] Intervenor Cowlitz Indian Tribal Housing a Motion for Reconsideration (CITH Motion) with the Board on August 22, 2008.
[4] Respondent Lewis County filed a Motion for Reconsideration (County Motion) with the Board on August 25, 2008.
[5] *See* Panesko Motion.
[6] *See* Napavine Motion.
[7] *See* CITH Motion.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

designation process which is not supported by the GMA.[8] In addition, Lewis County joins with Napavine and asserts that by requiring justification for the market factor the Board has improperly shifted the burden of proof in this matter.[9]

Pursuant to WAC 242-02-832(1), the Board also received answers or responses to the Motions for Reconsideration from the following: Petitioners Eugene Butler and Futurewise (collectively, Futurewise);[10] Petitioner Panesko;[11] and, Lewis County.[12] In addition, CITH sought leave to file a Response to the Panesko Response, contending this Response contains numerous inaccuracies and statements which if understood in the proper context actually support CITH's position set forth in its Motion for Reconsideration.[13]

II. DISCUSSION

A motion for reconsideration of a final decision of a Board is governed by WAC 242-02-832. It provides, at WAC 242-02-832(2), that a motion for reconsideration must be based on at least one of the following grounds:

(a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
(b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
(c) Clerical mistakes in the final decision and order.

---

[8] County Motion, at 1-3.
[9] Id., at 3.
[10] Petitioners Butler and Futurewise filed their Answer to Napavine and Lewis County's Motions for Reconsideration on August 29, 2008 (Futurewise Answer).
[11] Petitioner Panekso filed his Response to CITH's and Lewis County's Motions for Reconsideration on September 2, 2008 (Panesko Response). WAC 242-02-832 requires any answers/responses to motions for reconsideration be filed within five (5) days. Given the weekend and holiday occurring during the filing period, Panesko's filing of this response was timely.
[12] Lewis County filed its Response to Petitioner Panesko's Request for Reconsideration and Joinder in Intervenor Cowlitz Indian Tribal Housing's Reply in Support of Request for Reconsideration on August 29, 2008 (County Response).
[13] Intervenor CITH filed its Reply to Petitioner Panesko's Response to Motion for Reconsideration and correlated Motion for Leave to File Reply with the Board on August 29, 2008 (CITH Reply).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Motions for Reconsideration will be denied when they present no new arguments that were not previously considered in the original decision.[14]

A. CITH's Reply to Panesko Response

CITH seeks leave to file a Reply to the Panesko Response and Lewis County seeks to join in that Reply. The basis of this request is Panesko's Response to CITH's original Motion for Reconsideration. It is to this Response that CITH seeks to Reply, contending the Response contains numerous inaccuracies and statements that if understood in the proper context actually support CITH's position on reconsideration.[15]

This Board has previously held reply briefs are not permitted during reconsideration:

> The reconsideration rules provision of WAC 242-02-832 *does not authorize the filing of a reply brief to a response to the motion for reconsideration*. Each side gets one opportunity to set forth arguments on reconsideration.[16]

The Board finds no basis to deviate from this previous holding; CITH's Motion for Leave is **DENIED** and, therefore, **CITH's Reply to Panesko's Response will not be considered by the Board and is STRICKEN. In correlation, Lewis County's Joinder in this Reply will not be considered.**

B. " Show Your Work": Napavine and Lewis County Motions

With its motion, Napavine contends the Board erred and should reconsider its decision regarding Finding of Fact 18 and Conclusion of Law H. The FDO states these as follows:[17]

---

[14] *CCNRC v. Clark County*, WWGMHB No. 96-2-0017 (Order on Reconsideration, Jan. 21, 1998) (Emphasis added).
[15] CITH Motion for Leave to File Reply, at 1; CITH Reply, at 1.
[16] *Servais v. Bellingham,* WWGMHB Case No. 00-2-0020 (Order on Reconsideration, Nov. 20, 2000). *See also, Cave-Cowan v. Renton,* CPSGMHB Case No. 07-3-0012 (Order on Reconsideration, May 24, 2007) (Concluding WAC 242-02-832 provides for only the original motion and an answer).
[17] FDO, at 35 and 37.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Findings of Fact:

18. Napavine's land capacity analysis does not explain how it reached the market factors it employed. While Napavine's Urban Growth Petition does mention the presence of large lots that are unlikely to develop or redevelop, as well as the presence of greenbelts and critical areas, there is no explanation of how these potential constraints resulted in the selected market factor.

Conclusion of Law:

H. The County failed to "show its work" to support the analysis required by RCW 36.70A.110 when establishing a reasonable market factor to support the expansion of the UGA's boundaries.

Napavine argues that the Supreme Court's recent holding in *Thurston County v. WWGMHB* demonstrates the wrong standard was applied when the Board concluded Lewis County's Land Capacity Analysis (LCA) did not explain how the County reached the market factor utilized and, thus, the County's actions were non-compliant with the GMA because it failed to "show its work."[18] Napavine cites the Court's holding to support its contention that the GMA does not require a county to explicitly identify a land market supply factor (market factor) or to provide justification for adopting such a factor in the comprehensive plan, nor does the GMA contain a requirement for a county to justify its UGA designation if agreement is reached with a city as to the UGA boundary. [19] Napavine then argues that when applying the appropriate standard – the clearly erroneous standard - as articulated by the Court in *Thurston County,* the entire Record for this matter supports a finding that the market factor utilized by Napavine is reasonable and Petitioners have provided no evidence to rebut the facts set forth in the Record. Rather, Petitioners simply argue a preference for a different numerical value.[20] Therefore, Napavine requests the Board reverse its decision regarding the justification of the City's market factor.

---

[18] Napavine Motion, at 2-3.
[19] Id., at 2-33 (citing *Thurston County,* Case No. 80115-1, at 26-27, 29).
[20] Napavine Motion, at 4-5.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Lewis County joins in Napavine's Motion and emphasizes that with the Court's holding in *Thurston County* it is clear the Board cannot use a bright-line rule for evaluating the reasonableness of a land market supply factor or subject a higher percentage market factor to greater scrutiny.[21] The County contends the burden was on the Petitioners to prove the market factor was clearly erroneous and, specifically in regards to the availability of lands for development within the planning horizon, the Petitioners failed to meet this burden.[22]

In response to Napavine's Motion, Futurewise asserts *Thurston County* announced, at best, a new proposition of law, but this proposition does not alter the facts of the case.[23] According to Futurewise, with the August 15 FDO, the Board reviewed whether the Napavine UGA exceeded the amount of land necessary to accommodate the projected urban growth and Futurewise supported its assertion that the UGA was not appropriately sized. Futurewise contends it provided evidence and argument in regards to the reasonableness of the market factor and the land capacity analysis, both in relationship to buildable lands and density, to support its position.[24] Futurewise points to Napavine's faulty calculations used in determining the size of the UGA including application of the market factor to the total housing units needed, rather than projected growth; inconsistent application of the market factor in comparison to the Lewis County Comprehensive Plan (25 percent versus 100 percent); inconsistent acreage requirements for the UGA; and the erroneous double counting of greenbelts and critical areas.[25] Futurewise goes on to

---

[21] County Motion, at 3.
[22] Id., at 3-4.
[23] Futurewise Answer, at 2.
[24] Id., at 3-4.
[25] Id., at 3-7. Futurewise also raises allegations as to inconsistency, stating that Lewis County's Comprehensive Plan uses a 25 percent market factor for the Napavine UGA and total acreage requirements for the UGA vary from 1,453 acres in the County's Plan versus 2,138 to 3,558 acres in the City's needs analysis. But Futurewise did not raise the concept of inconsistency in this regard within its issue statement nor did it assert this in its HOM Briefing. Thus, this allegation is not simply new argument to support the claims of Futurewise but a new issue. New issues may not be raised on reconsideration.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

contend Napavine provides no new evidence or argument but references previously submitted argument it has set forth in its HOM Response Brief to support its assertions.[26]

Board Discussion

The Board first notes that what Napavine requests is reversal of what it considers a requirement for justification of Napavine's market factor – what the City deems the historic "show your work" requirement. This request is based on the Supreme Court's recent pronouncement in *Thurston County v. WWGMHB*.[27] Napavine, joined by Lewis County, contends this ruling requires reversal of the Board's decision regarding the justification of a market factor, pointing specifically to Finding of Fact 18 and Conclusion of Law H. Generally, the Board will not consider the application of Court decisions issued after the Board has reached its decision in a matter because it is the law and facts at the time the decision was rendered which confine reconsideration; not an interpretation of the law that was unavailable for consideration at the time of the Board's decision. To allow reconsideration based on legal interpretations made after issuance of a decision by the Board would frustrate the finality that is sought for land use decisions in Washington State. Here, however, the Supreme Court issued its decision in the *Thurston County* matter one day prior to the Board's issuance of the FDO and therefore the Court's interpretation was the law in place at the time.[28]

The text of the cited Finding and Conclusion does, in essence, denote that Napavine failed to show the necessary analysis required when establishing a reasonable market factor – the "show your work" requirement. The phrase "show your work" was first used by the Central Puget Sound Growth Management Hearings Board to describe the explicit documentation of

---

[26] Id., at 7.
[27] *Thurston County v. Western Washington Growth Management Hearings Board,* Case No. 80115-1 (August 14, 2008).
[28] The Board notes, that at this point in time, the Board's decision had been made and all that was left in its decision-making process was final editing of the FDO prior to issuance.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

factors and data used by counties when undertaking the sizing of UGAs.[29] Because UGA sizing relies primarily on mathematical calculations and numerical assumptions, the Board concluded that such a showing of work was required in order to demonstrate the analytical rigor and accounting that supported the sizing and designation of UGAs. Without that both the Board and interested citizens would have no criteria against which to judge a County's UGA delineation.[30] This requirement was subsequently adopted by this Board. However, it has since been clarified that requiring the record to support a jurisdiction's actions neither amounts to "justification" nor does it result in a shifting of the burden; the burden remains on the petitioner to demonstrate the analysis was clearly erroneous.[31]

The Board recognizes that, as with all legislative enactments, comprehensive plans and development regulations are presumed valid upon adoption.[32] However, a presumption is not evidence; its efficacy is lost when the opposing party adduces *prima facie* evidence to the contrary.[33] Therefore, the presumption of validity accorded to legislative enactments is not conclusive but rebuttable. In order to overcome the presumption, a petitioner must persuade the Board that the jurisdiction's action was clearly erroneous and to do so it must present clear, well-reasoned legal argument supported by appropriate reference to the

---

[29] *Association of Rural Residents v. Kitsap County,* CPSGMHB Case No. 93-3-0010, Final Decision and Order, at 35 (1994). The Eastern Washington Growth Management Hearings Board has also adopted this requirement – *see Knapp, et al v. Spokane County,* EWGMHB Case No. 97-1-0015c, Final Decision and Order (1997).

[30] *Futurewise et al v. Lewis County,* WWGMHB Case No. 06-2-0003, Final Decision and Order (2006); *See coordinated cases Klein v. San Juan County,* WWGMHB Case No. 02-0008, *Ludwig et al v. San Juan County,* WWGMHB Case No. 05-2-0019c, *Campbell et al v. San Juan County,* WWGMHB Case No. 05-2-0022c, Compliance Order/Final Decision and Order (2006); *Master Builders Association v. Snohomish County,* CPSGMHB Case No. 01-3-0016, Final Decision and Order (2001); *Hensley, et al v. Snohomish County,* CSPGMHB Case No. 03-3-0009c, Final Decision and Order (2003); *McAngus Ranch, et al v. Snohomish County,* CPSGMHB Case No. 99-3-0017, Final Decision and Order (2000).

[31] *See coordinated cases Abenroth v. Skagit County,* WWGMHB Case No. 97-2-0060c and *Skagit County Growthwatch v. Skagit County,* WWGMHB Case No. 07-2-0002, Final Decision and Order (2007)(citing to *Port Townsend v. Jefferson County,* WWGMHB Case No. 94-2-0006, Final Decision and Order (1994)); *See also Hensley, et al v. Snohomish County,* CSPGMHB Case No. 03-3-0009c, Final Decision and Order (2003).

[32] RCW 36.70A.320(1).

[33] *Bates v. Bowles White & Co,* 56 Wn.2d 374, 378 (1960) (citing *Kay v. OccidentaL Life Ins. Co*., 28 Wn. 2d 300, 183 P. 2d 181 (1947); *Gardner v. Seymour*, 27 Wn. 2d 802, 180 P. 2d 564 (1947)).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

relevant facts, statutory provisions, and case law which establishes that the GMA's requirements have not been met. Once a petitioner has overcome the presumption, the responding jurisdiction must then present evidence to contradict a petitioner's allegations.[34]

The Board recognizes the Supreme Court's holding that a requirement for the County to identify and prospectively justify its market factor in its comprehensive plan distorts the presumption of validity afforded to such enactments. **Thus, this Board finds that a local jurisdiction planning under the GMA is not required to explicitly identify or set forth a prospective justification for a market factor within its comprehensive plan.** However, the Board does not read the Court's holding in *Thurston County* as transforming the presumption of validity into a conclusive presumption. The presumption of validity is rebuttable and remains as such. This very fact was noted by the Supreme Court when it stated:[35]

> *Once a petitioner challenges* the size of a county's UGA, the county may explain whether the difference between supply and demand is due to a land market supply factor or other circumstances. If the county asserts a land market supply factor was used in designating the UGA boundaries, the *petitioner may argue the factor employed was clearly erroneous and unreasonable based on the facts in the record*...

Therefore, the purpose and function of the Board's "show your work" requirement is, and in this Board's view has always been, a demonstration by the County upon challenge of the facts and evidence supporting its action in response to a petitioner's prima facie case. There is no distortion of the presumption of validity or a shifting of the burden. The presumption is rebuttable by evidence and legal argument. If rebutted it then becomes incumbent upon the County to present contrary evidence from the Record. Without having the ability to review supporting evidentiary documentation, the Board's ability to determine whether a jurisdiction has complied with the GMA would be irretrievably compromised.

---

[34] *Wells v. WWGMHB,* 100 Wn. App. 657, 661 (2000).
[35] *Thurston County v. WWGMHB,* Case No. 80115-1, at 32 (2008) (In relevant part, internal citations omitted, emphasis added).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Therefore, the Board is not asking the County to demonstrate it has complied with the GMA. Rather it is only requiring the County to show the analytical analysis that supports the sizing of the UGA as adopted. It is then the Board's role to review this analysis, in conjunction with the facts and arguments presented by Petitioners, and determine whether the County has complied with the goals and requirements of the GMA.

For the Motions for Reconsideration currently before the Board, the question is whether the August 15 FDO required an identification and prospective showing of justification for the market factor utilized in regards to the Napavine UGA in the Comprehensive Plan or whether the showing of work referred to by the Board was simply a recognition that Futurewise had presented a *prima facie* case which overcame the presumption of validity. As a result the County was then required to present countering evidence. For the reasons set forth below, the Board finds the latter.

The Board's analysis pertaining to the market factor is set forth on Pages 19 to 21 of the August 15 FDO. In that analysis, the Board sought to determine not whether a market factor had been identified or included but whether the market factor was reasonable in light of the entire record before the Board. Although the Board did state that in arriving at an appropriate market factor to support expansion of a UGA a jurisdiction must "show its work," the Board was not requiring a prospective justification that would distort the presumption of validity. Rather, the Board was attempting to discern (upon a *prima facie* showing by Futurewise that the Napavine UGA was erroneously sized) whether the market factor employed to support the UGA's size was *reasonable.* Specifically, when addressing the market factor methodology, the Board stated:[36]

> As Futurewise points out, the existing housing units already exist, the market has already supplied the land needed to accommodate the existing population. By applying the market factor to existing units of housing rather than those needed to accommodate growth, the City overstates the amount of

[36] August 15, 2008 FDO, at 20-21(In relevant part, Emphasis in original).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

> land needed to accommodate its year 2025 needs. The Board finds this error to be clearly erroneous and violated of RCW 36.70A.110(2) which requires counties to include areas and densities sufficient to permit the urban growth that is *project to occur* for the succeeding twenty-year period.
> …
> While the City's Urban Growth Petition does mention the presence of large lots that are unlikely to develop or redevelop, as well as the presence of greenbelts and critical areas, there is no explanation of how these potential constraints results in the selected market factor. Furthermore, if the presence of critical areas was used to support the market factor, it appears it was inappropriately used … The City cannot explain the need for a market factor based on the presence of critical lands, and then use the presence of critical lands to support an even larger UGA. This process amounts to double counting of critical areas [and] overstates the land needed for UGA expansion.

Therefore, although Futurewise did set forth argument as to a standardized market factor, no bright line numerical number was applied by the Board.[37] Rather it was the analytical analysis for the numerical percentage that is Napavine's market factor which was needed in order for the Board to determine whether or not the market factor was reasonable. In essence, it was the effect of stated constraints on the numerical value of the market factor the Board found missing from the analysis – giving the Board the responsibility to examine the reasonableness of the market factor especially since the end result was that there were absolutely no undeveloped/underdeveloped lands within Napavine that could potentially be developed/redeveloped within the 20-year planning horizon.

In its Motion, Napavine re-argues that infill and redevelopment of existing lots is unlikely to occur because of economic constraints or owner intent to preserve property in its current state, thereby demonstrating the local circumstances that support the reasonableness of its market factor.[38] Although Petitioners, in their original briefing, questioned whether property

---

[37] Futurewise, in its original briefing, asserted that a market factor could not exceed 25 percent. Given recent rulings from the Court, the Board finds no such prohibition exists in the GMA. Instead, RCW 36.70A.110(2) provides that the market factor, if used, must be "reasonable" and in selecting the market factor, "cities and counties may consider local circumstances".

[38] Napavine Motion, at 4-5 (citing to Napavine's HOM Response Brief and supporting exhibits).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

labeled as "unlikely" to develop would actually develop within the planning horizon, the argument settled more on the basis for a market factor of up to 100 percent for residential needs when the allegedly undevelopable land encompassed less than 10 percent of the City's UGA.[39] Essentially, what Futurewise argued was that it was *unreasonable* for the City and County to assume not a single acre of undeveloped/underdeveloped land currently within the existing UGA would be developed/redeveloped over the next 20 years.

The Board agrees with Futurewise that a market factor which assumes not a single acre of land within the city would develop within the succeeding 20-years is unreasonable. Although the GMA affords discretion to cities and counties on how to plan for and accommodate growth within their communities, the GMA also mandates that efforts should be taken to encourage urban growth within urban areas, thereby reducing sprawl, focusing development into areas which have the necessary public facilities and services to offer the area's residents, etc. In this regard, the GMA seeks the implementation of actions that contain growth within existing urban areas as opposed to consuming lands without investigating ways to stimulate and encourage infill development. By not enacting policies and regulations which would encourage and promote development/redevelopment of undeveloped/underdeveloped lands currently within the existing UGA, Napavine fails to implement fundamental tenets of the GMA. In other words, the Board decided that a market factor which allows for the designation of twice the residential lands needed to accommodate the projected growth is unreasonable when feasible and rational planning options are available to a community to focus urban growth within its borders.

In any event, the underlying aspect to the Board's holding in the August 15 FDO was that upon a challenge by Futurewise that the market factor selected was unreasonable, Napavine or Lewis County needed to provide the Board with the necessary contradicting analytical evidence and this was not done. Undoubtedly, this is because the analytical

[39] Futurewise HOM Brief, at 9-12.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

analysis that supports the determination – in conjunction with errors in application (e.g. existing residential development, reduction for critical areas) – was not contained within the Record. Thus, the failure to present contradicting evidence and an incomplete record deprives the Board of the ability to adequately review the challenged action for compliance with the GMA and results in a finding that the action was clearly erroneous and requires a remand so that a full, accurate, and complete Record can be presented.

Conclusion: The Board acknowledges the Supreme Court's holding in *Thurston County v. WWGMHB* and the Court's interpretation that the GMA does not require a city or county to explicitly identify or prospectively justify the use of a market factor within its comprehensive plan. However, once a challenge has been raised by a petitioner in which the market factor is asserted to be clearly erroneous and unreasonable based on the facts in the Record, evidence denoting the analytical analysis utilized by the city or county in determining its market factor must be presented to the Board so that the reasonableness of the market factor, taking into account local circumstances, may be considered.

The required analysis has not been presented to the Board and, therefore, the ability of the Board to determine whether or not a market factor of up to 100 percent is reasonable for the City of Napavine is not possible at this point in time. Without this contradicting evidentiary analysis, the Petitioners *prima facie* case is left unchallenged. Because of this**, the City of Napavine's Motion in this regard is DENIED. Similarly, Lewis County's Motion in this regard is DENIED.**

C. Critical Areas – Napavine

Napavine contends the Board misconstrued the Record when it concluded that critical areas were used to support the market factor, pointing out critical areas were deducted as part of the City's needs analysis but were not taken into account when developing the market

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

factor.[40] Therefore, Napavine requests the Board revise its decision, specifically Findings of Fact 18 and 19, so as to clearly show that critical areas were not a consideration in establishing the market factor.[41]

In response, Futurewise states that not only does Napavine fail to offer any new evidence or argument to support its motion but attempts to justify its market factor based on the fact that "more than half of Napavine's existing UGA … consists of greenbelts and critical areas." [42]

Board Discussion

As noted in the Board's FDO, it appeared from the Record that the presence of critical areas was used when determining an appropriate market factor - especially when reference was made by Napavine itself as to the limited development potential of land due to environmental constraints – as well as in regards to determining the total acreage for the UGA, with approximately 787 acres of greenbelts and/or critical areas accounted for in the acreage allocation. As noted *supra,* without a clear showing of the analytical calculations utilized to determine the market factor, the Board's review finds the Record supports Futurewise's claim that critical areas were accounted for twice. With its Motion, Napavine failed to provide analysis or contradicting evidence to clarify this assertion.

Conclusion: From the Record before the Board it is apparent the City of Napavine included the presence of critical areas when determining the appropriate UGA size, both in regards to buildable lands and the market factor – in essence, accounting for critical areas twice. Therefore, **Napavine's request for the Board to revise Findings of Fact 18 and 19 in this regard is DENIED.**

D. Invalidity - Cowlitz Tribal Indian Housing and Lewis County

---

[40] Napavine Motion, at 6.
[41] Id., at 6-7.
[42] Futurewise Answer, at 7 (citing to Napavine Motion, at 4).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

CITH and Lewis County both assert the Board erred when it held that invalidity attaches to land rather than to the disputed County plan or regulation.[43] CITH's request pertains to lands involved in the Toledo UGA expansion. Lewis County's request also pertains to lands involved in the Toledo UGA expansion as well as the Curtis LAMIRD.

CITH contends that in the August 15 FDO the Board characterizes the Toledo UGA expansion area as land "under invalidity" and thereby misinterprets applicable GMA provisions and imposes an additional review and approval process that is not required by the GMA.[44] CITH cites RCW 36.70A.302 and WAC 242-02-831 to support its assertion that invalidity pertains to a plan or regulation, not individual parcels of land, and that the language is unambiguous.[45] CITH further asserts that there is nothing in the GMA that "precludes the County from moving forward with land use planning decisions even though there has been an invalidity determination regarding plans or regulations" and the Board erred when it concluded the County must move for invalidity to be lifted prior to making such planning decisions.[46]

CITH cites the Board's holding in *Panesko v. Lewis County* to demonstrate that an invalidity rescission process was not necessary and that the true issue before the Board in this matter was whether or not the Toledo UGA expansion complied with the GMA.[47] CITH then puts forth argument that the Toledo UGA expansion is consistent with prior invalidity orders and regulatory agricultural land designation criteria, specifically noting parcel size, soils, flood hazard, and agricultural value.[48]

---

[43] CITH Motion, at 1-2; Lewis County Motion, at 1-2.
[44] CITH Motion, at 2.
[45] Id., at 3-4.
[46] Id., at 5. CITH did concede that although planning decisions may continue, the GMA does not permit such decisions when those decisions would be based on plans or regulations which have been deemed invalid.
[47] Id., at 4-5 (citing to *Panesko v. Lewis County,* Case No. 00-2-0031c, Order on Reconsideration (March 21, 2004)).
[48] Id., at 8-9.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Lewis County joins in CITH's motion and similarly argues that the Board's ruling "creates an additional step in an applicant's effort to re-designate property that is, in the Board's view, 'subject to' invalidity" by requiring an applicant to "request that the Board 'lift' the taint of invalidity allegedly attached to the land."[49] According to the County, the GMA does not expressly impose this additional step nor does the GMA impose invalidity on the land itself, rather invalidity applies to a plan or regulation.[50] Lewis County further states that without expressed authority, the Board lacks the jurisdiction to impose this additional requirement.[51]

In response, Panesko contends both CITH's and Lewis County's Motions reflect a lack of understanding of the agricultural resource lands (ARL) cases that have occurred over the past nine years.[52] Panesko points out that the designation of land within Lewis County is codified by Lewis County Code (LCC) Title 17 and specifically the maps in LCC 17.200.[53] According to Panesko, the Board's Determination of Invalidity currently in effect within Lewis County applies to the failure of the comprehensive plan to designate ARL across the entire county and since these lands exclude urban, government, and other types of natural resource lands, the only lands within the "pool" covered by the invalidity order is the County's rural lands.[54]

Panesko goes on to note that because invalidity was in place, the County lacked authority to amend its comprehensive plan and development regulations to include land within the City of Toledo's UGA which was impacted by the Board's Determination of Invalidity.[55] In addition, Panesko notes CITH's claims that the parcel no longer satisfies the County's ARL were not appropriate for inclusion within a motion for reconsideration.[56]

---

[49] Lewis County Motion, at 2.
[50] Id., at 2 (citing to RCW 36.70A.302(6)).
[51] Id.
[52] Panesko Response, at 1-2.
[53] Id., at 2.
[54] Id., at 2-3.
[55] Id., at 3-4, and 6.
[56] Id., at 5-6.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

CITH filed a Reply to Panesko's Response and Lewis County joined in that Reply. However, as noted *supra,* the Board has previously determined WAC 242-02-832 does not permit the filing of reply briefs and therefore the Board gives no consideration to the arguments presented within CITH's Reply.

Board Discussion

Since the first cases were filed with this Board against Lewis County, the question of the proper designation of agricultural resource lands within Lewis County has had a consistent presence.[57] The County's responsive efforts to this question have risen through the courts, reaching the Supreme Court in 2006,[58] and have since returned to this Board for further review.[59] In the most recent holding regarding ARL lands, the Board continued to find the County's designation process set forth in its Comprehensive Plan was flawed and that the County's development regulations pertaining to ARL lands, in some regards, undermined the GMA's agricultural conservation mandate by failing to adequately protect against negative impacts to agricultural resource lands and the industry that relies on them.[60]

This Motion for Reconsideration concerns the Board's ruling in regards to Issue 5 (Toledo UGA)[61] and Issue 6 (Curtis LAMIRD),[62] with expansion of these areas involving lands impacted by a County process that has long been under a Determination of Invalidity. Specifically, relevant to this discussion, CITH points to the following Findings of Fact and Conclusion of Law:[63]

---

[57] *See e.g.* WWGMHB Case Nos. 98-2-0011c, 99-2-0027c, 00-2-0031c, and 01-2-0010c.
[58] *Lewis County v. WWGMHB,* 157 Wn.2d 488 (2006).
[59] *See e.g.* WWGMHB Case No. 08-2-0004.
[60] *Hadaller, et al v. Lewis County,* Case No. 08-2-0004 (FDO, July 7, 2008) consolidated with Compliance Orders in Case Nos. 99-2-0027c and 00-2-0031c.
[61] See FDO, at 22-29 for discussion and analysis of Issue 5.
[62] See FDO, at 29-33 for discussion and analysis of Issue 6.
[63] August 15, 2008 FDO, at 36-37.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Findings of Fact:

20. The land added to the Toledo UGA is land under invalidity from a prior Board order.

21. The Board imposed a Determination of Invalidity affecting the land in the Toledo UGA in a February 13, 2004 Order, and again on June 7, 2008 (sic).[64]

22. In the Board's combined Final Decision and Order and Compliance Order, issued on July 7, 2008, the Board concluded that it would not lift invalidity from these lands until the County properly considered and designated its agricultural resource lands (ARL).

Conclusion of Law:

J. The County may not expand the Toledo UGA to include land under invalidity. Only after invalidity has been lifted from the affected parcels may the County include this land in the UGA.

Lewis County does not cite specific Findings or Conclusions, but includes the Curtis LAMIRD within its Motion pertaining to invalidity. The Board notes the following Conclusion of Law relates to invalidity and the Curtis LAMIRD:[65]

Conclusion of Law:

L. Until invalidity has been removed from the affected land in the Curtis Rail Yard, it is premature to consider it for inclusion with a LAMIRD.

Panesko asserts these lands were subject to a Determination of Invalidity issued by the Board in February 2004, again in June 2007, and re-affirmed in July 2008, and as such it was inappropriate for the County to transfer the land into the Toledo UGA or Curtis LAMIRD. The Board agreed, noting that a change in designation of land subject to a Determination of Invalidity could only occur after a Motion for Lifting Invalidity had been made and the Board modified and/or rescinded invalidity.[66]

---

[64] The correct issuance date is June 8, 2007 and Finding of Fact No. 21 shall be so amended by this Order.
[65] August 15, 2008 FDO, at 37.
[66] Id., at 26-27, 29.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Thus, the Board sees the primary question raised on reconsideration as essentially the impact of a Determination of Invalidity – does it solely invalidate a non-compliant jurisdiction's comprehensive plan and/or development regulations or are the lands themselves restrained by the invalidity so as to preclude future land use planning decisions from impacting these lands?

The GMA authorizes the Board to issue a Determination of Invalidity as to part or all of a comprehensive plan or development regulation upon finding a jurisdiction is non-compliant with the GMA and that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA.[67] The GMA further provides there are two ways in which invalidity may be removed – by motion of the county or city subject to such invalidity or after a compliance hearing which considered the county's or city's enactment amending the invalidated part or parts of the plan or regulation.[68] The driving analysis in all regards remains the requirement that any legislative enactment not only comply with the requirements of the GMA, but also that it not substantially interfere with the goals of the GMA.

Therefore, the Board agrees with CITH and Lewis County that it is the non-compliant jurisdiction's comprehensive plan and/or development regulations that are rendered invalid, not the land itself. However, the County's Comprehensive Plan is a generalized coordinated land use policy statement that serves as a guiding framework, the blueprint for all land use planning decisions made by the County. Its development regulations implement those goals and policies set forth in the comprehensive plan and represent the controls placed on the development and use of land.[69] As such, when a comprehensive plan or development regulation has been invalidated, this invalidation is intrinsically linked to the use of land which those policies, goals, and regulations address. After all, the purpose of

---

[67] RCW 36.70A.302.
[68] RCW 36.70A.302(6), .302(7).
[69] RCW 36.70A.030(4); .030(7); *Citizens of Mt. Vernon v. Mt. Vernon,* 133 Wn. 2d 861 (1997).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

invalidation is to preclude non-GMA compliant development from occurring until such time as the jurisdiction has taken responsive action to remedy its non-compliant action of the past. Despite CITH's and Lewis County's statements to the contrary, **a Determination of Invalidity does in fact impede future land use planning decisions – it places such decisions on hold until the jurisdiction has demonstrated compliance with the GMA.** To agree with CITH and Lewis County's assertions would essentially eviscerate the function and purpose of invalidity which the Board views as precluding the future development of land until it can be determined by the Board that the jurisdiction is acting in compliance with goals and requirements of the GMA. Specifically, in regards to agricultural lands, to allow planning decisions to go forward prior to Lewis County having fulfilled a primary and fundamental requirement of the GMA in designating and protecting such lands would result in the potential loss of land before it was ever even considered. Thus, in this situation, the lands themselves may not be under invalidity but the land use designation and zoning that authorizes their development is.

As noted *supra,* the Board provides two methods for removing a Determination of Invalidity – upon motion by a jurisdiction subject to invalidity or after a compliance hearing – both of which require Board action. Contrary to CITH's and Lewis County's contention, requiring a non-compliant jurisdiction subject to invalidity to request invalidity be removed *prior to* making future land use planning decisions is therefore not an additional step created by the Board but is explicitly articulated in the GMA itself – both by authorizing only the Board to lift invalidity and precluding future development until compliant provisions have been adopted.

In addition to the arguments presented on the application of invalidity, CITH alternatively asserts the expansion of the Toledo UGA is consistent with the County's Comprehensive Plan and Development Regulations and that the Invalidity Orders issued by the Board did not invalidate the specific provisions of the County's regulations with which the Toledo UGA

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

classification is consistent.[70] CITH points out it presented argument in its original briefing, but that the Board did not address the argument – resulting in a "truncated analysis of an issue that is critical to the determination here."[71] CITH argues the parcel sought for inclusion within the UGA does not satisfy the criteria for designation of ARL lands, including farmland classification, parcel size, current use and value as agricultural land, and flood hazard and thus the County acted consistently with its planning goals, policies, and regulations.[72,73]

The argument presented by CITH that the subject parcel is not suitable for designation as ARL goes to the very heart of the issue of invalidity – that a jurisdiction may not engage in future planning decisions when such decisions involve lands for which the guiding policies and goals and controlling regulations have been found invalid.

The Board's June, 2007 Compliance Order which found Lewis County's response to the Supreme Court's remand[74] was to repeal provisions pertaining to agricultural land including implementation designation criteria and mapping of ARL lands. This left the County with no lands subject to the legislative mandate for conservation of agricultural land and, thus, the County was non-complaint and its actions warranted invalidity.[75] In essence, with not an acre of land officially designated as agricultural lands the County had indisputably failed to

---

[70] CITH Motion, at 7.
[71] Id., at 8.
[72] Id., at 8-10.
[73] CITH further argues this parcel was created pursuant to a boundary line adjustment and is immune from invalidity. RCW 36.70A.302(3)(b)(iii) does provide that even if such an application has not vested a determination of invalidity does not apply *so long* as the boundary line adjustment or division of land does not increase the number of buildable lots existing before receipt of the Board's Order. A boundary line adjustment is a tool for making minor changes to existing property lines to reflect survey or legal description errors or consolidating existing lots. It is not a process utilized to create a new lot solely for the benefit of sale. Here, it appears CITH's 10-acre parcel was not simply a boundary line adjustment but a subdivision of a parent parcel which totaled approximately 79 acres. *Panesko Response,* at 5.
[74] *Lewis County v. Western Washington Growth Management Hearings Board,* 157 Wn.23d 488 (2006).
[75] *See coordinated cases: Panesko v. Lewis County,* WWGMHB Case No. 99-2-0027c, *Butler v. Lewis County,* WWGMHB Case No. 00-2-0031c. In addition, Lewis County's request set forth in the June 2007 Compliance in which the County specifically requested the Board to expand the applicable Determination of Invalidity to encompass Class A and B agricultural lands.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

comply with a foundational mandate of the GMA. As a result, the Board entered a Determination of Invalidity which included, at the County's request, Class A and B agricultural lands.[76]

Although the County has continued to improve its process for designating and conserving agricultural lands throughout the years, in July, 2008, the Board still concluded that the *County's designation process was flawed* in several ways and, based on the facts, findings, and conclusions before the Board, it determined it was premature to lift the earlier invalidity order while the County still had not properly designated its agricultural resource lands.[77] Thus, the County's designation process for agricultural lands as a whole remains non-compliant and invalid and the Toledo UGA expansion lands are undeniably impacted. Therefore, the Board did not consider whether or not this individual parcel of land satisfied a designation process which still has flaws. Without a compliant designation process, all lands evaluated under a flawed process are themselves flawed – and the Board will not reconsider this finding.

Conclusion: Lewis County's designation process for agricultural lands has been found to be deficient because it does not further the GMA's mandate to conserve agricultural lands of long-term commercial significance and to maintain and enhance the agricultural industry. Utilizing flawed or deficient criteria does not result in a decision that is compliant with the GMA regardless of its consistency with individual elements of the criteria. A Determination of Invalidity has been in place in Lewis County since 2004, both in relationship to various provisions of the County's Comprehensive Plan and the County's Development Regulations. The invalidity of a land use designation process is linked to the land for which these designations apply, limiting future land use planning decisions regarding these lands

---

[76] *See coordinated cases: Panesko 99-2-0027c, Butler 00-2-0031c,* Compliance Order/Imposing Invalidity (June 2007).

[77] *See coordinated cases: Panesko 99-2-0027c, Butler 00-2-0031c, Hadaller 08-2-0004c,* Final Decision and Order/Compliance Order (July 2008).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

until such time as the Board has determined the County has achieved compliance with the GMA and invalidity is no longer warranted. This the Board has not done and therefore actions taken by Lewis County to change the designation of these lands prior to the adoption of GMA compliant provisions results in an "end-run-around" of the function and purpose of the GMA's invalidity provisions. Prior to implementing future planning decisions, the non-compliant jurisdiction must seek and obtain rescission of a Determination of Invalidity by demonstrating that it has adopted compliant provisions which do not substantially interfere with the goals of the GMA. Therefore, **CITH's and Lewis County's Motion for Reconsideration is DENIED.**

E. Panesko Motion for Reconsideration

With his Motion, Panesko asserts the Board erred in three regards. First, Panesko notes the Petition for Review challenged two enactments – Resolution No. 07-359, amending the Comprehensive Plan, and Ordinance 1198, amending the Development Regulations – but that the Board's FDO only required the County to bring its Comprehensive Plan into compliance with the GMA, failing to included the non-compliant portions of the Development Regulations.[78]

Second, Panesko argues that the Board failed to note Lewis County's non-compliant use of the GMA's definition of Urban Growth Areas which requires the inclusion of acreage within city limits.[79]

Finally, Panesko asserts the Board erred when it concluded a challenge to the amendment of the Mossyrock UGA map represented a mapping error dating back to 2004 and was untimely.[80] Panesko contends he did properly challenge the amendment, which did not

[78] Panesko Motion, at 1-2.
[79] Id., at 3.
[80] Id., at 4.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

occur until 2007, noting that there was no amendment to challenge in 2004.[81] Panesko goes on to question the procedure for correcting mapping errors and the expiration date of amendments.[82]

In response, Lewis County appears to concede that reference to the applicable development regulations may be included within the Board's Order.[83] However, the County tempers this by noting Panesko's request is vague and only those changes that are supported should be authorized.[84]

Board Discussion

1. Comprehensive Plan and Development Regulations

In his Petition for Review, Panesko presented four issues which questioned GMA compliance in regards to the Comprehensive Plan and the Development Regulations – Issue 3 (Mossyrock), Issue 4 (Napavine), Issue 5 (Toledo), and Issue 6 (Curtis LAMIRD). Of these four issues, the Board concluded the County erred on all issues except for Issue 3 in that the County authorized expansion of UGAs or LAMIRDs which were non-compliant with the GMA. Thus, as determined by the Board's August 15 FDO, Lewis County Code Chapter 17.200, the Official Zoning Maps of the County, and all other maps and text in Chapter 17.200 that were modified by Ordinance 1198 to reflect changes made necessary by the adoption and approval of the UGA and rural area amendments must also be brought into compliance.

Conclusion: **Panesko's Motion for Reconsideration in this regard is GRANTED.**

2. Definition of Urban Growth Areas

---

[81] Id., at 4-5.
[82] Id., at 5-6.
[83] Lewis County Response, at 3.
[84] Id., at 4.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

According to Panesko, Lewis County did not consider the acreage within the city as part of its UGA acreage, as demonstrated by Table 4.1, thereby understating its UGA acreage, and the Board erred when it did not find that the County failed to use the proper definition of UGAs.[85] Panesko refers to Page 29 of the August 15 FDO, asserting the Board's statement that the Toledo UGA is 117 acres and the City of Toledo contains 234 acres is contrary to RCW 36.70A.030(18) and .110(1) because the GMA requires cities to be within UGAs.[86] Panesko requests the Board to find that it erred when it failed to determine that the Comprehensive Plan, including Table 4.1, is non-compliant because the County failed to use the proper definition of UGAs and that the Board should modify the text of the Toledo discussion to use UGA acreages consistent with the GMA definition to include acreage within city limits.[87,88]

In response, Lewis County notes Panesko adds nothing new to the argument previously presented to the Board but simply repeats his argument that the County improperly distinguishes between incorporated city areas and unincorporated UGAs.[89] According to Lewis County, these terms are distinct concepts and nothing in the GMA precludes the County from utilizing such a distinction.[90]

Although the Board concluded that Table 4.1 did not accurately reflect modifications to urban and rural lands acreages, Panesko misreads the FDO in regards to the UGA definition. The FDO stated:

---

[85] Panesko Motion, at 3.
[86] Id.
[87] Id.
[88] The Board notes that Panesko requested the Board to "modify the text" of the Comprehensive Plan. The Board historically has not mandated a certain method or action when it determines a jurisdiction's action is non-compliant with the GMA. Rather, just how a jurisdiction seeks to comply with the Board's order is at the sole discretion of the jurisdiction; the Board will not modify the comprehensive plan of a jurisdiction so that the text reads as a petitioner requests.
[89] Lewis County Response, at 2-3.
[90] Id. at 3.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

> With regard to the alleged discrepancy between the size of the *[Toledo] City limits* (234 acres) and the *unincorporated UGA area* (117 acres), the Board finds no error and accepts the County's explanation that these are *two separate concepts* …[91]

Panesko is correct in that RCW 36.70A.110(1) requires each city to be located within a UGA but this same provision also authorizes areas outside of a city to be within a UGA. Table 4.1, with its categories of Cities, City UGAs, and County UGAs, may be a bit confusing and not a model of clarity but the Land Use Element of the County's Comprehensive Plan clearly denotes that each of its cities are located within a UGA and that a UGA may be comprised of supplemental lands to accommodate growth in addition to other areas serving as UGAs, such as planned communities. It is not uncommon for a county to label an *unincorporated* UGA with the name of the city that will one day have regulatory authority over the area or is simply adjacent to the area and it appears that Lewis County did just that. Therefore, the Board concludes Lewis County has complied with the GMA in regards to the definition of a UGA, as provided in RCW 36.70A.030(19) and 36.70A.110(1), and finds no error with the statement made in its August 15 FDO.

Conclusion: **Panesko's Motion in this regard is DENIED.**

3. Mossyrock UGA Boundary

Panesko asserts the Board erred when it concluded that his challenge to the Mossyrock UGA was untimely. More specifically, Panesko takes issue with the Board's finding that the time to raise such a challenge was in 2004. Panesko argues he could not challenge the Mossyrock UGA expansion in 2004 because there were no changes to the comprehensive plan or development regulations available for challenge; as the County modified the map during its 2007 amendments. Panesko further questions the procedure for correcting errors

[91] August 15 FDO, at 29 (Emphasis added).

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

of omission asking when an amendment expires if a change authorized by the amendment is erroneously omitted.[92]

In response, Lewis County reiterates that the Mossyrock UGA was expanded in 2004 to include the area disputed by Panesko, and Panesko's appeal in this regard was simply untimely.[93]

The issue of the Mossyrock UGA was presented with Issue 3 and discussed by the Board on Pages 11 to 13 of the August 15 FDO. Based on the Record and the arguments presented, the Board determined that the actual expansion of the UGA was approved in 2004 but the County had inadvertently failed to map this change and with Ordinance 1198, adopted in 2007, the County corrected this omission. Although the correction to the map incorporated this acreage, the actual expansion of the UGA occurred in 2004 with the County's approval of Resolution 04-413. Thus any challenge to the expansion of the UGA needed to occur 60 days from publication. If Panesko had asserted that the correction in mapping adopted in 2007 did not implement the 2004 UGA expansion, his claim would be well founded. However, the basis for the Board's finding was grounded in Panesko's argument – that the inclusion of a 36.6 acre farm within the Mossyrock UGA was non-compliant with the GMA. This assertion is based on the County's 2004 action, not the County's correction in mapping effectuated by the 2007 adoption of Ordinance 1198, and is untimely.

Conclusion: Therefore, **Panesko's Motion in this regard is DENIED**.

---

[92] Panesko Motion, at 5-6.
[93] Lewis County Response, at 1-2.

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

III. ORDER

Having reviewed the parties' Motions for Reconsideration, the responses filed in regard to those Motions, and the relevant provisions of the GMA and the Board's Rules of Practice and Procedure, the Board finds:

A. The Motion for Reconsideration filed by Petitioner Panesko is GRANTED in part, DENIED in Part as follows:

1. Panesko's Motion for Reconsideration relating to Lewis County Development Regulations modified by Ordinance 1198, specifically Lewis County Code Chapter 17.200, the Official Zoning Maps of the County, and all other maps and text in Chapter 17.200 that were modified by Ordinance 1198 is GRANTED. Ordinance 1198 is remanded to Lewis County to take legislative action to bring those portions of the development regulations into compliance with the GMA as set forth in the Board's August 15, 2008 Final Decision and Order.

2. Panesko's Motion for Reconsideration relating to the County's definition of the term "Urban Growth Area" is DENIED.

3. Panesko's Motion for Reconsideration relating to the Mossyrock UGA is DENIED.

B. The City of Napavine's Motion for Reconsideration is DENIED, both in regards to its request for the Board to reverse its requirement for a showing of the analytical analysis used in determining the City's market factor after a challenge to a UGA's sizing has been raised and its request to modify Findings of Fact in relationship to the use of critical areas in determining the market factor.

C. Lewis County's Motion for Reconsideration is DENIED, both in regards to its joinder in the City of Napavine's request pertaining to a showing of the analytical analysis used in determining the City's market factor after a challenge to a UGA's sizing has been raised and its assertion as to the Board's application of the GMA's invalidity

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

provisions in regard to the Curtis LAMIRD and its joinder with the Cowlitz Indian Tribal Housing Authority in regard to the Toledo UGA.

D. The Cowlitz Indian Tribal Housing Authority's Motion for Reconsideration relating to the application of the GMA's invalidity provisions in regards to the Toledo UGA is DENIED. CITH's assertion that the site conforms to provisions of the County's Comprehensive Plan and Development Regulations is not appropriate for consideration at this time since the Board has previously concluded these provisions are deficient and substantially interfered with the goals of the GMA.

SO ORDERED this 15th day of September 2008.

_____
James McNamara, Board Member

_____
Holly Gadbaw, Board Member

_____
William Roehl, Board Member

Western Washington
Growth Management Hearings Board
319 7TH Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975